

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
  
Respondent,

v.

DAVID BRIAN HILL,  
  
Petitioner.

No. CR-10-0127-FVS  
CV-12-0394-FVS

ORDER DENYING PETITIONER'S  
SECTION 2255 MOTION

**THIS MATTER** came before the Court on Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. (ECF NO. 73). Petitioner is proceeding pro se. Respondent is represented by Aine Ahmed.

**BACKGROUND**

On October 5, 2010, Petitioner was charged by indictment with the following seven counts: Possession with Intent to Distribute 50 Grams or More of Pure (Actual) Methamphetamine (Count 1), Possession of a Firearm in Furtherance of a Drug Trafficking Crime (Counts 2 & 6), Felon in Possession of a Firearm (Counts 3 and 7), and Possession with Intent to Distribute 50 Grams or More of a Mixture or Substance Containing Methamphetamine (Counts 4 & 5). (ECF No. 15). Petitioner entered into a plea agreement pursuant to Rule 11(c)(1)(C) on January 27, 2011. (ECF No. 51). The United States agreed to dismiss Counts

1 1, 2 and 6, and Petitioner plead guilty to Counts 3, 4, 5 and 7. (ECF  
2 No. 51). On June 20, 2011, the Court accepted the Rule 11(c)(1)(C)  
3 plea agreement and sentenced Petitioner to a term of 120 months on  
4 Counts 3 and 7 and a term of 180 months on Counts 4 and 5, all to run  
5 concurrently. (ECF No. 68). Judgment was entered on June 20, 2011.  
6 (ECF No. 70). Petitioner did not appeal.

7 On June 12, 2012, Petitioner filed a Petition for a Writ of  
8 Habeas Corpus under 28 U.S.C. § 2255. (ECF No. 73). The Government  
9 filed a timely response on July 20, 2012. (ECF Nos. 76 & 78).  
10 Petitioner's reply was received on July 31, 2012. (ECF No. 79).

## 11 **DISCUSSION**

### 12 **I. Legal Standard**

13 28 U.S.C. § 2255 provides, in part:

14 A prisoner in custody under sentence of a court established by  
15 Act of Congress claiming the right to be released upon the ground  
16 that the sentence was imposed in violation of the Constitution or  
17 laws of the United States, or that the court was without  
jurisdiction to impose such sentence, or that the sentence was in  
excess of the maximum authorized by law, or is otherwise subject  
to collateral attack, may move the court which imposed the  
sentence to vacate, set aside or correct the sentence.

18 A petitioner is entitled to an evidentiary hearing on the motion  
19 to vacate his sentence under 28 U.S.C. § 2255, unless the motions and  
20 the files and records of the case conclusively show that the prisoner  
21 is entitled to no relief. This inquiry necessitates a twofold  
22 analysis: (1) whether the petitioner's allegations specifically  
23 delineate the factual basis of his claim; and, (2) even where the  
24 allegations are specific, whether the records, files and affidavits  
25 are conclusive against the petitioner. *United States v. Taylor*, 648  
26 F.2d 565, 573 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal  
quotations, citations and footnote omitted).

1 Because the Court finds that the evidence in this case is  
2 conclusive against Petitioner (*see infra*), the Court additionally  
3 finds that an evidentiary hearing on the motion to vacate is not  
4 necessary.

## 5 **II. Issues Presented**

6 Petitioner presents the following two grounds for relief pursuant  
7 to 28 U.S.C. § 2255:

8 1. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

9 2. PROSECUTORIAL MISCONDUCT

10 (ECF No. 73).

## 11 **III. Analysis**

### 12 **A. Ineffective Assistance of Counsel**

13 Petitioner argues that his trial counsel rendered ineffective  
14 assistance by failing to "investigate witnesses against Petitioner  
15 prior to a plea agreement" and "obtain material exculpatory evidence  
16 that would have been critical in the negotiations of his plea  
17 bargain." (ECF No. 73). Petitioner complains that his trial counsel  
18 failed to investigate evidence that the Government's key witness,  
19 Officer Edwards, was involved in criminal misconduct.

20 In reviewing a claim of ineffective assistance of counsel, the  
21 Court applies a two-part test: "First, the defendant must show that  
22 counsel's performance was deficient. Second, the defendant must show  
23 that the deficient performance prejudiced the defense." *United States*  
24 *v. Recio*, 371 F.3d 1093, 1109 (9th Cir. 2004) (quoting *Strickland v.*  
25 *Washington*, 466 U.S. 668, 687 (1984)). Under the first element, the  
26 Court must examine "whether counsel's assistance was reasonable  
considering all the circumstances." *Strickland*, 466 U.S. at 688.

1 This requires the Court to analyze counsel's performance with some  
2 deference, as "counsel is strongly presumed to have rendered adequate  
3 assistance and made all significant decisions in the exercise of  
4 reasonable professional judgment." *Id.* at 690. Counsel's performance  
5 is not ineffective unless it fails to meet an objective standard of  
6 reasonableness under prevailing professional norms. *Id.* at 688.

7 Under the second element, it must be shown "that counsel's errors  
8 were so serious as to deprive the defendant of a fair trial." *Recio*,  
9 371 F.3d at 1109 (quoting *Strickland*, 466 U.S. at 687). "It is not  
10 enough for the defendant to show that the errors had some conceivable  
11 effect on the outcome of the proceeding." *Strickland*, 466 U.S. at  
12 693. Indeed, "[v]irtually every act or omission of counsel would meet  
13 that test, and not every error that conceivably could have influenced  
14 the outcome undermines the reliability of the result of the  
15 proceeding." *Id.* (citation omitted). Rather, Petitioner "must show  
16 that there is a reasonable probability that, but for counsel's  
17 unprofessional errors, the result of the proceeding would have been  
18 different. A reasonable probability is a probability sufficient to  
19 undermine confidence in the outcome." *Id.* at 694.

#### 20 **1. Counsel's Performance**

21 As previously indicated, Petitioner claims that his trial counsel  
22 was ineffective because he failed to investigate evidence that the  
23 Government's key witness, Officer Edwards, was involved in criminal  
24 misconduct. Petitioner's assertions, however, make no specific  
25 allegation that his counsel's choices and actions were unreasonable,  
26 nor are there specific allegations that Petitioner's case was  
prejudiced by his counsel's tactics or strategy. *See United States v.*

1 *Hearst*, 638 F.2d 1190, 1194-95 (9th Cir. 1980), *cert. denied*, 451 U.S.  
2 938 (1981) (a petitioner must make specific factual allegations which,  
3 if true, would entitle him to relief). Petitioner's argument thus  
4 lacks a specific allegation which, if true, would entitle him to  
5 relief.

6 In any event, the record demonstrates that Petitioner's counsel  
7 did not fail to investigate as alleged. On February 15, 2011, the  
8 Government, Petitioner, and Petitioner's counsel engaged in a free  
9 talk to discuss Petitioner's August 24, 2010 arrest and surrounding  
10 events. (ECF No. 76 at 4). The purpose of the free talk was to  
11 discuss the alleged misconduct on the part of Officer Edwards  
12 regarding the officer's involvement with a bail bondsman leading up to  
13 and during Petitioner's arrest. *Id.* When the Government learned of  
14 the investigation into Officer Edwards' conduct, the Government  
15 immediately notified counsel for Petitioner, and counsel for  
16 Petitioner notified his client of the investigation. *Id.*

17 Petitioner agreed to participate in the free talk to discuss  
18 further information regarding the investigation of Officer Edwards.  
19 (ECF No. 76 at 4-5). Investigating officers interviewed Petitioner to  
20 determine whether officers improperly failed to note in their reports  
21 that Petitioner had been tased and whether officers, in particular  
22 Officer Edwards, had used a bounty hunter to conduct a search of the  
23 hotel room. (ECF No. 76 at 5). It was ultimately determined there  
24 was no impropriety on the part of the officers involved, including  
25 Officer Edwards. *Id.*

26 Contrary to Petitioner's assertions, he and his trial counsel  
were fully informed of the internal investigation of Officer Edwards

1 prior to the Court's acceptance of the Rule 11(c)(1)(C) plea agreement  
2 on June 20, 2011. (ECF No. 69). Consequently, there has been no  
3 showing that Petitioner's representation was deficient as defined by  
4 *Strickland*.

## 5       **2. Prejudice to Defense**

6       Petitioner is further not able to demonstrate that his counsel's  
7 performance was prejudicial.

8       Again, Petitioner has not made specific factual allegations as to  
9 his ineffective assistance of counsel claim. *See Hearst*, 638 F.2d at  
10 1194-95. While Petitioner asserts that his counsel failed to  
11 "investigate witnesses against Petitioner prior to a plea agreement"  
12 and "obtain material exculpatory evidence that would have been  
13 critical in the negotiations of his plea bargain," Petitioner's  
14 assertions fail to identify what and how additional information would  
15 have specifically contributed to his defense. The information of  
16 which Petitioner complains does not contradict the evidence of his  
17 criminal charges. As indicated by the Government, evidence of Officer  
18 Edwards' alleged misconduct does not negate the Government's evidence  
19 that Petitioner was a felon in possession of a firearm and did engage  
20 in possession with the intent to distribute methamphetamine. (ECF No.  
21 76 at 12). There are no specific allegations that Petitioner's case  
22 was prejudiced inasmuch as the result of the proceedings would have  
23 been different.

24       Based on the foregoing, it is apparent that the performance of  
25 Petitioner's counsel was neither deficient, nor did it result in  
26 prejudice to Petitioner. Petitioner has not only failed to provide a  
specific allegation that his counsel's tactics or strategy were

1 unreasonable, but it is also clear that Petitioner and his trial  
2 counsel were made fully aware of the investigation of Officer Edwards  
3 prior to the Court's acceptance of the Rule 11(c)(1)(C) plea  
4 agreement. Petitioner has additionally failed to show that prejudice  
5 resulted from any alleged failures by his counsel.<sup>1</sup> Accordingly,  
6 Petitioner's ineffective assistance of counsel claim is denied.

7 **B. Prosecutorial Misconduct**

8 Petitioner also contends that the Government failed to disclose  
9 *Brady* material prior to the negotiation and execution of his plea  
10 agreement. (ECF No. 73 at 2). Petitioner claims that the Government  
11 withheld documents which would have shown that "critical witnesses  
12 were lying or mistaken in important respects." (ECF No. 73 at 3).  
13 Petitioner specifically asserts that the Government withheld evidence  
14 that Officer Edwards was involved in criminal misconduct.

15 As indicated above, when the Government learned of the  
16 investigation into Officer Edwards' conduct, the Government  
17 immediately notified counsel for Petitioner, and counsel for  
18 Petitioner notified his client of the investigation. (ECF No. 76 at  
19 4). Petitioner then agreed to participate in a free talk to discuss  
20 the investigation of Officer Edwards. (ECF No. 76 at 4-5).  
21 Therefore, contrary to Petitioner's assertions, he and his trial  
22 counsel were aware of the internal investigation of Officer Edwards  
23 prior to the Court's acceptance of the plea agreement.

24 Petitioner's prosecutorial misconduct claim is without merit.

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25 <sup>1</sup>Importantly, internal investigators concluded there was no  
26 impropriety on the part of Officer Edwards in this case. (ECF  
No. 76 at 5).

The Court being fully advised, **IT IS HEREBY ORDERED** as follows:

2. The District Court Executive is directed to enter judgment in favor of Respondent and **CLOSE** this case as well as the corresponding civil case: **CV-12-0394-FVS**.

**DATED** this 11th day of September, 2012.

S/Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge